THE PARLIAMENT ACT AND THE BRITISH CONSTITUTION.

The passing of the Parliament Act, 1911, has not fundamentally altered the character of the British Constitution; nor has it even rendered necessary a revision of the accepted categories of political science. The British Constitution remains, to all substantial intents, the sole example, in civilized countries, of a "common law" or unwritten constitution; also as the most conspicuous of the very few "flexible" constitutions of the world. Despite the fact that another document has been added to the fairly long list which the student of the British Constitution has to assimilate, the essentially judicial character of the Constitution as a whole remains; just as the general body of English law remains essentially judicial, despite the mass of legislation (Parliamentary and other) which permeates it. Also, notwithstanding the very exceptional provisions affecting Parliamentary powers and procedure contained in the statute itself, the Parliament Act, like all other parts of the British Constitution, remains legally alterable by ordinary Parliamentary enactment. The provisions inserted at the last moment, in deference to the wishes of the House of Lords, would, in the very unlikely event of any serious proposal being made to ignore them, doubtless prove to be of considerable weight in controlling public opinion. In that sense, they are a contribution towards constitutional morality. But no considerable authority has ventured to suggest that they impair the cardinal doctrine of Parliamentary sovereignty.

Nevertheless, the Parliament Act is an important measure. It may be usefully compared with the Petition of Right of 1628, and the Bill of Rights of 1689—two documents which stand as beacons in the path of constitutional development. The object of those who framed the older documents was to restrict the executive authority *de facto* exercised, and claimed as of right, by the Crown. Whatever the real attitude of mind of the seventeenth century reformers, it suited their immediate purpose to pose as conservative. As all students of English history are aware, this is a marked feature of the whole constitutional struggle of the seventeenth century; from the days of Coke, who gave the beginning of the struggle its peculiar character, to the days of Somers and Halifax, who brought the struggle to a successful close in the

Revolution settlement. Accordingly, the words of the Petition of Right and the Bill of Rights are carefully chosen to express the view that these important documents merely restore, for the most part, the *status quo ante*—some rather vague date not specifically mentioned. The Crown is described as having violated the "just rights and liberties" of the subject, and such violation is denounced in solemn language; while, to prevent any similar violations in the future, acts of the kind alleged against the Crown are expressly declared to be illegal. The Bill of Rights goes further than the older and shorter Petition of Right; and provides, in one case, that a violation of its provisions shall actually absolve the subjects of the Crown from their allegiance. But, in all other cases, including the undoubted novelty of the total abolition of the "dispensing power," even the Bill of Rights is content to rely on that characteristic feature of the British Constitution, the independence of the courts of justice; and it is expressly declared that the long list of claims enumerated in the declaration on which the statute is founded, are the "true, ancient, and indubitable rights and liberties of the people of this kingdom."

It is, perhaps, germane to the comparison, though the limits of this article preclude an adequate discussion of the question, to ask whether the apparently conservative character of the Petition of Right and the Bill of Rights was not more apparent than real. Had the Crown in fact, in former times, billeted soldiers upon citizen householders, issued commissions for the execution of martial law, dispensed with laws or the execution of them, raised and kept a standing army in time of peace, interfered in Parliamentary elections, and otherwise invoked its prerogative position in the manner so roundly condemned by these famous statutes? Undoubtedly it had; and the somewhat desperate attempts of the framers of the statutes to invoke the aid of legal authority in support of their propositions, serve rather to reveal the fact than to disprove it. The position of the medieval monarch is often misunderstood. That he was not "sovereign" in the Austinian sense may be fully admitted; for the simple reason, that the juristic doctrine of sovereignty was foreign to the medieval atmosphere, though the word "sovereign" was familiar enough. The keynote of medieval thought is relativity; and, to the medieval thinker, the fact that Our Lord the King was "sovereign," no more implied that his subjects were rightless as against him, than the fact that the head of an Oxford college was "sovereign" implied that his will

was law. The chief man in any conspicuous organization was, in the Middle Ages, a "sovereign;" it was not until, after the Reformation, Bodin, Montesquieu, Grotius, and Hobbes, in their several countries, began to philosophize in terms of modern political thought, that "sovereignty" (which, historically speaking, is merely "supremacy") began to assume its artificial and "absolute" character. By that time, much of the political field had, in England at least, been quietly occupied by bodies which had no sort of intention of merging themselves in the sovereignty of an absolute monarch. Of these bodies, Parliament was, no doubt, the most conspicuous. But, despite the bad period of the early seventeenth century, the law courts, with the sturdy example of Coke to inspire them, also ultimately made good their independence. And, finally, albeit sorely handicapped by an official terminology which treated them as the simple mouthpieces of the Crown, the executive officials, to whose predecessors the freedom of the subject owes more for creating the idea of universal legality than is commonly recognized, were cautiously building up the doctrine that the King, even in matters executive, was bound to act, not of caprice, but as a constitutional ruler. The best exponent of this somewhat elusive doctrine is, perhaps, that highly respectable but somewhat ponderous statesman, the first Earl of Clarendon; and it was in this sense that the unpopular acts of Charles and James were "illegal," and, probably, in many instances, in no other sense. But, for a constitutional ruler, there can hardly be any mistake so fatal as to adopt a line of conduct which the public conscience disapproves, and his own officials condemn. The word "illegal" may not, to a lawyer, be exactly the most fitting epithet which such conduct merits; but it is a singular testimony to the law-abiding character of England in the seventeenth century, that the severest critics of the royal policy should have chosen such a word to justify their attack. For, as a maker of history, it can hardly be questioned, that the "sovereignty," or supremacy, of the Crown in legislative, executive, and judiciary, had, until the end of the sixteenth century, manifested itself in just those very kinds of acts which the Petition of Right and the Bill of Rights condemn as "illegal." Such "sovereignty" survives to the present day as "prerogative;" subject, of course, to the express provisions of those and other statutes, and to the important limitation, that it must be exercised, in almost all cases, according to the advice of responsible Ministers.

Turning now to the other side of the parallel, we may at once admit that the Parliament Act, 1911, is clearly wanting in that peculiar conservative phraseology which has been noted as the most conspicuous feature of the Petition of Right and the Bill of Rights. Rhetoric has ceased, for practical reasons, to form part of the contents of an Act of Parliament. The *exordium* has dwindled to the "recital;" and, as all English lawyers know, the good draftsman reduces his recitals to a minimum. Save for one important exception, to be hereafter briefly referred to, the Parliament Act drives straight at the two chief reforms to be accomplished by the statute. The House of Lords is to have no power at all over money bills. In respect of money bills, Parliament is to be frankly uni-cameral; and the identification of such measures, subject to the comprehensive definition of the Act itself, is to be settled by an official of the House of Commons, the holder of the historic office of Speaker. Other public measures the House of Lords may reject twice in successive sessions; but not oftener. On the third presentation of the same measure, by the same or a new House of Commons, in the third consecutive session, the bill may, in spite of a third refusal of the Lords to accept it, be presented for the royal assent without their lordships' concurrence. From this sweeping enactment are excepted only measures extending the maximum duration of Parliament; but a guarantee of good faith is provided by the stipulation, that the clause shall not operate until at least two years have elapsed since the measure in question was read a second time in the House of Commons.

Finally, by a self-denying ordinance which has provoked very little discussion, but which may, in the future, prove to be the most revolutionary clause of the statute, the Parliament Act, 1911, reduces the maximum period of the duration of a Parliament to five years. The avowed object of this clause was to turn aside the objection that a House of Commons sitting for seven years might, though its "mandate" had been exhausted, force upon an unwilling House of Lords measures in support of which there existed no presumption of popular approval. In other words, the quinquennial clause of the Parliament Act is a characteristically cautious and indirect acceptance of the doctrine of the Referendum.

If the wording of the Act is revolutionary, what is its effect?

With regard to the first of the three enactments which form the body of the statute, it may safely be said, that it is far more revolutionary in form than in substance. Once only since the

Reform Act of 1832, has the House of Lords, until the recent crisis, thrown out a real money bill; and on that occasion it accepted immediate defeat, without an appeal to the country. The Finance Bill of 1909, though it undoubtedly introduced new principles of taxation, was essentially a finance measure, in the sense that it concerned itself, almost if not quite exclusively, with ways and means. There was even a general agreement as to the objects for which it was desirable to raise money; though there were profound differences of opinion as to the way in which the money should be raised. According to long Parliamentary tradition, finance consists of two aspects—ways and means on the one hand, and expenditure on the other. Of these two aspects, ways and means is that which, historically, is the oldest peculiar privilege of the Commons. This fact has been admitted by every constitutional writer of repute in modern times; its existence has been pointedly recognized in the Royal Speech which opens and closes the session for at least one hundred years. Whether or not the exclusive privilege of the Commons in finance can be justified on abstract grounds of political wisdom, may be a doubtful point. It is clear that the action of the House of Lords in throwing out the Finance Bill of 1909 was revolutionary; that the country will not, at the present day, tolerate a financial supremacy in the House of Lords; and that co-ordinate authority in finance, if conceivable, would involve a redistribution of political authority, the effects of which it would be difficult to foresee. The first enactment, then, of the Parliament Act, 1911, simply consecrates the state of things which all politicians treated as indisputable for many years prior to 1909.

One word should, however, be said as to the power conferred on the Speaker to decide the authencity of an alleged money bill; for, in such a matter, American readers may be pardoned for a possible misconception of the position.

It is, unfortunately, true that, in the excitement of recent events, both the authority and the impartiality of the Speaker have been called in question by members of the House. But these lapses from the most sacred tradition of Parliament have been severely condemned. The disgraceful outburst of disorder which occurred on the discussion of the Lords' amendments, if it had any direct effect at all, probably turned the scale in favor of the bill, by determining sober-minded and responsible members of the Lords' House, such as the Primate, to vote with the Government. The

hasty accusation of partiality made (outside Parliament) by a Labor member, was unreservedly withdrawn and apologized for. In fact, since the excellent practice of treating the Speakership as a permanent office was adopted more than half a century ago, successive Speakers have deservedly enjoyed a reputation for impartiality at least equal to that of the judicial bench, and hardly less than that of the monarch. During almost the whole of the recent long tenure of office by Unionist Ministries, the House of Commons was ruled with complete acceptance by two Liberal Speakers. During the whole of the present Liberal *régime,* it has accepted, with equal satisfaction, the rule of a Conservative Speaker. So strong, indeed, is the feeling of respect for the Speaker's office, that it is now considered to be something like "bad form" even to oppose the return of the incumbent in his constituency. The confidence reposed in the Speaker by the Parliament Act is, therefore, entirely in accordance with recent tradition, as it is certainly in accordance with sound sense and convenience. To have allowed either the Opposition or the Lords to cast a decisive vote on the character of an alleged money bill, would have been to render futile the central clause of the Parliament Act; to have referred the question to the law courts would, apart from consideration of delay, have been either to risk the probability of a disastrous conflict between the legislature and the judiciary, or to admit a subordination which Parliament has, on more than one occasion, emphatically repudiated. The advisory recommendation to the Speaker, to consult, "if practicable," two of his colleagues in the House before giving his decision, was inserted in the bill at the last moment as an attempt at conciliating the Lords, and will, without doubt, be loyally followed. It has no legal value.

We come now to the really revolutionary clause of the Act, *viz.*, the restriction of the Lords' "veto" to a second rejection of an ordinary public bill passed in three successive sessions by the Commons. This clause in effect substitutes for the academic solution of a "deadlock" hitherto accepted by constitutional writers, a new practical solution which, unless and until reversed by legislation, will have the force of law in the strictest sense. The academic solution referred to is, of course, the doctrine that the verdict of the constituencies at a General Election decides a dispute between the two Houses. It is unnecessary to discuss the merits of this doctrine; for, as a working solution, it had clearly broken down before the introduction of the Parliament Bill. The famous boast of the

defeated Leader of the Opposition, that the Unionist party, "in or out of office," ruled the destinies of the Empire, sealed its doom. Further than that, it at last aroused in the nation what is, perhaps, the strongest of British characteristics, the instinct of fair play. In all probability, there is no very wide-spread or homogeneous enthusiasm among average men for the particular propaganda of the present Government; but the translation into practice of the "heads I win, tails you lose" maxim enunciated on behalf of the Opposition, has produced, at any rate, a tacit approval of the new solution. What effects are likely, or unlikely, to follow?

In the first place, the change will certainly not destroy the House of Lords as a legislative body. In the event (improbable, it is to be hoped) of the Lords continuing a steady opposition to Liberal proposals, it will speedily be found, that a power to delay for two years the passing of a first-class measure is far from trivial. The enormous labor involved in the steering of such a measure through the Commons, the odium incurred by the application of a categorical imperative in the second and third sessions (for it must be remembered that a single substantial amendment in the Commons after the first presentation of a measure to the Lords will take that bill out of the Act), the uncertainty produced by a state of suspended animation—all these considerations will give immense weight to any amendments, not amounting to a direct negative, which may be put forward by the Upper House. If, on the other hand, as may be confidently hoped, the Lords accept the Parliament Act in good faith, and, realizing that their "absolute veto" is gone, trust to reason and persuasion instead of brute force, the lurid atmosphere which, in recent years, has shrouded the relationship of the Houses will give way to pleasanter weather; and it may well be that a harassed Minister, overborne by extremists in the heat of Commons' debate, will gratefully transfer to the shoulders of their lordships that responsibility for moderation from which popular leaders have been known to shrink. After all, both Lords and Commons are human beings; and it is a matter of everyday experience, that disinterested and really wise suggestion is accepted, where insistence as of right on similar views provokes that spirit of combativeness which is rarely absent from human character, and which, in democratic systems of government, is elaborately cultivated and, indeed, almost worshipped as a fetish.

On the other hand, it may well be, that the change now under consideration will prove to be a thorn in the side of many a political leader; for it has radically altered the conditions of political promises. Hitherto, at any rate in recent years, political programmes have somewhat lightly secured official benediction, in spite of, perhaps sometimes because of, their Quixotic character. The precise shade of mental difference between an intellectual acceptance of a proposed reform and a conviction of its practical desirability, may not be easy to define; but there is no real cynicism in suggesting that it counts for a good deal in the hurly-burly of politics. A Minister may honestly believe, for example, in the abstract proposition, that women ought to have votes; and so he may fairly express his approval of a Woman Suffrage Bill. Until a month ago, he could do so with the certain conviction, that the House of Lords would never pass such a measure. Now, though he may attempt to deprive his approval of official character, it will involve a more serious responsibility. The House of Lords is no longer an insurmountable barrier; it is merely a hill which can be climbed by laborious effort. If the Parliament Act produces a greater sense of responsibility in active politicians, it will be well worth the labor involved in passing it.

Space forbids further speculation of a discursive kind; but one, perhaps rather obvious, suggestion may be made. The Parliament Act, 1911, has, owing to the good sense and moral courage of a few members of the House of Lords, done a good deal to banish from the political pharmacopœia that violent remedy for the diseases of the Constitution, the "swamping" creation of peers. Until the last moment, of course, it looked as though this much talked-of, but rarely used drug, were likely to be administered on a scale hitherto regarded as impossible. But, at the last moment, the patient wisely elected for the milder alternative, and, by so doing, banished the violent specific to a horizon yet more remote, if that were possible, than that which it has hitherto occupied. It is, no doubt, abundantly possible, that a legislative measure might, in the eyes of its supporters, be so urgent as not to brook even a two years' delay; but the natural repugnance of the Crown to resort to what is really a *coup d'état,* would be greatly, almost overwhelmingly, strengthened by the fact, that the Parliament Act, for the first time in the history of the Imperial Parliament, provides a constitutional alternative.

The last of the three enactments of the measure under review

is that which shortens the maximum duration of Parliaments. As is well known, the subject has had a chequered history. In the Middle Ages, Parliaments rarely lasted longer than a year; probably there was a tradition that the burden of service ought not to be imposed on a representative for more than one or two sessions. The Tudors, especially in their later period, found Parliaments somewhat difficult to manage; and, when they got one to their liking, kept it. With the Stuarts, the question shifted to the suspension of Parliaments; the first Triennial Act of 1641, though it, almost accidentally, prohibited any Parliament lasting more than three years, was really concerned with preventing the intermission of Parliaments. But the Long Parliament outstayed its welcome; and Charles II, taking advantage of the repeal of the Triennial Act of 1641, kept his "Pensionary" Parliament too long. The Act of 1694, originally brought forward in the Upper House, limited the duration of Parliaments to three years; but the invasion of 1715 was the reason, or the excuse, for extending the period to seven. It is hardly disputable, that the change of 1715 contributed powerfully to the growth of the Cabinet system of government; and it may well be that the most recent change will have some effect in weakening that system. There is, of course, no essential connection between the life of a Ministry and the life of a Parliament; and the journalistic system of reckoning Ministries by General Elections is indefensible in theory. Nevertheless, every Ministry passes through a crisis at a General Election; and the risk of dissolution is appreciable. The short-lived Parliament works better with the fixed executive, as in America, or with the group system, as in France, than with the strongly personal and almost hereditary character of the British Cabinet. Five years are a hitherto untried period; and again it well may be, that this apparently trifling and ostensibly accidental change may lead on to a new development of that political originality which is a peculiar feature of the British genius. Certainly the Cabinet system, despite its striking history, is abundantly open to criticism; but, at the close of an article already too long, it would be out of place to condescend upon far-reaching prophecy.

Only one other topic can be touched upon. At an earlier stage, reference was made to the significant and apparently irrelevant "recitals" with which the Parliament Act opens. Readers of that measure will find, that King, Lords, and Commons have committed themselves to the view, that for the present House of Lords

there must be substituted a Second Chamber, constituted on a popular basis, and wielding limited and defined powers. It is "intended" that this substitution shall be effected.

It is not for an academic writer to suggest motives for the insertion, in a measure of the importance of the Parliament Act, of this formal announcement. But it may be permitted to point out its singularly embarrassing character. Doubtless, the recitals have no legal value; on the other hand, in the peculiar atmosphere of British politics, their moral and political influence is bound to be great. They are an example of that kind of political concordat which is, perhaps, the nearest thing in British Constitutional Law to the "fundamental principles" with which non-sovereign legislatures are familiar; and the fact that they are guaranteed only by moral sanctions adds to, rather than detracts from, their weight. Accusations of bad faith, to which British statesmen are honorably sensitive, are certain to follow any attempt to disregard them; and unless such attempts should (which is unlikely) commend themselves to the general sense of the community as a wholesome change of policy, they will embitter a situation already bitter enough.

And yet, is it seriously proposed to substitute for the present House of Lords a Second Chamber constituted on a "popular" basis? A popular basis, in British politics, inevitably means a representative basis, and a representative basis, not merely of classes, but of population. The House of Lords is already partly representative; but no one could possibly say that, even in those parts, it was "constituted on a popular basis." And what is a Second Chamber, constituted on a popular basis, but with limited and defined powers, to do in the British Constitution, alongside of the popularly elected and unfettered House of Commons? Briefly speaking, there are two functions of first-class importance which might be performed by the House of Lords in the future; and neither of them could be performed by a popularly elected House, with limited and defined powers.

The first of these functions has been previously touched upon. There is real scope for the House of Lords as a skilled advising body, containing the best character and brains of the nation, but not claiming any authority other than that belonging to its own inherent wisdom and experience. If the Crown continues to ennoble the really most eminent commoners from all professions and callings, the House of Lords will always contain the flower

of the nation, its most distinguished experts in physical science, scholarship, diplomacy, warfare, art, literature, philanthropy, and legal learning. Whether or not the present practice of swamping these eminent specialists with political nonentities and undistinguished offspring is continued, will be comparatively immaterial; for, even if the "backwoods" peers attend the debates, votes, under the new conditions, will be weighed rather than counted. The actual records of divisions will matter little; what will count with the nation and the Government will be the personalities and the arguments. Doubtless the tradition of purely advisory bodies is in favor of secrecy, rather than publicity, of discussion; but it is impossible to advise a nation in secret, and it will be the nation to which the new function of the House of Lords will specially appeal. The instinct of reverence in democracies, at any rate in British democracy, is only second to the instinct of self-assertion; and an instrument for appealing to it would be of incalculable value. The peculiar position of the Crown, as trustee of the executive, debars the Crown from exercising this function; it is a great opportunity for the Lords. But it could not be seized by a House "constituted on a popular basis."

The second opportunity of the future for the House of Lords, is the function of acting as a Federal Chamber. While any definite scheme of a Federal Constitution for the Empire will probably have to wait many years for its realization, recent events have unmistakably revealed a willingness on the part of the constituent nations to combine in common action. Here, again, the problem is similar; and the solution is to be found on similar lines. Let there be no attempt at compulsion, no suggestion of personal interest; and the true wisdom and influence of the House of Lords will work beneficently. No more welcome peerages have been created in recent years than those of Lord Strathcona, Lord Mount-Stephen, and Lord De Villiers. The unwise policy of the House of Lords itself in the *Wensleydale Case* has, unfortunately, in too many cases, restricted the choice of the Crown to childless men. Such a restriction is suicidal and detestable; and one legal reform of which the House certainly stands in need is the restoration to the Crown of the power to create life-peers. With this restriction removed, and with a thoroughly good understanding among all parts of the Empire, it would be possible to infuse into the House of Lords the best brains and character, not only of the European races which render allegiance to the British Crown, but of the

ancient races of India and the East. The words of such men, spoken with full responsibility, but without the bitterness of party feeling, in the historic House of Lords, would carry weight and influence to the remotest corners of the Empire; while a brand-new Second Chamber, constituted on a popular basis and wielding as of right limited and defined powers, would merely add another discordant element to the political whirlpool.

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